

CPI's Europe Column Presents:

Morningstar v Commission – Setting the Bar High for Third Parties Challenging EU Commitment Decisions

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Introduction

On 15 September 2016, the General Court upheld a Commission decision making commitments binding on Thomson Reuters under Article 9 of Regulation 1/2003. *Morningstar v Commission* is only the second case in which EU Courts ruled on the validity of commitments adopted under a so-called “Article 9 procedure” and marks the first time ever for an EU Court to rule on the allegation that commitments are insufficient to address the Commission’s concerns. By stressing the Commission’s broad margin of discretion, the General Court set the bar high for unsatisfied third parties to appeal commitment decisions.

Commitment decisions are rarely appealed

Article 9 of Regulation 1/2003 allows the Commission to end proceedings brought under Articles 101 or 102 TFEU by making commitments binding on the company under scrutiny. Such commitments are offered by the companies under investigation to address the concerns expressed in the Commission’s preliminary assessment in order to avoid the adoption of a formal infringement decision under Article 7 of Regulation 1/2003. The voluntary nature of the commitment process explains the limited number of cases brought under appeal to EU Courts. The only prior case involved an appeal by which diamond producer Alrosa argued that the commitments made by its trading partner (De Beers) were excessive as they entailed the total discontinuation of its trade with De Beers.¹ *Morningstar v Commission*² is the first case in which a third party appeals a decision adopted under Article 9 of Regulation 1/2003 arguing that the commitments do not remedy the concerns raised by the Commission.

No manifest error in the Commission’s assessment

In its review of the Thomson/Reuters concentration, the Commission became aware of restrictive licensing practices operated by Reuters in relation to consolidated real-time market datafeeds (which are streams of continually updated market information used by financial service providers as a basis to – amongst others – provide financial advice and make investment decisions). The Commission considered these concerns not to be merger-specific and opened separate proceedings under Article 11(6) of Regulation 1/2003 against Thomson Reuters once the takeover was completed.

In the framework of these proceedings, the Commission found Thomson Reuters to be dominant in the worldwide market for consolidated real-time datafeeds. According to the Commission, Thomson Reuters had abused its market strength by imposing restrictions on licences for alphanumeric codes (so-called “Reuters Instrumental Codes” or “RICs”), used by financial institutions to retrieve information on specific financial instruments from the Thomson Reuters database. In particular, Thomson Reuters prohibited its customers from using RICs to retrieve data from competing databases. It also prevented third parties from developing tools using RICs to make the Thomson Reuters system interoperable with consolidated real-time datafeeds of other providers. RICs were often integrated in the customers’ internal IT applications, meaning that they would need to go through the long and costly process of rewriting them when switching providers. The Commission concluded that the restrictions on RIC licences raised substantial barriers for switching datafeed providers,

¹ CFI, Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601; CJEU, Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949. The General Court annulled the Commission decision but this ruling was overturned by the Court of Justice.

² CFI, Case T-76/14 *Morningstar v Commission*, Judgment of 15 September 2016, nyr.

leading to the foreclosure of competing providers and causing consumer harm.

In order to remove these concerns, Thomson Reuters committed to (i) offer extended RIC licences to customers allowing them to switch some or all of their internal applications to competing datafeed providers, and (ii) offer separate RIC licences to third parties to develop and maintain switching tools enabling interoperability between the Thomson Reuters system and competing systems. Whereas competing consolidated real-time datafeed providers are allowed to support third party developers, they are excluded from obtaining RIC licences directly from Thomson Reuters.

Morningstar, a competing consolidated real-time datafeed provider, brought an appeal against the decision making these commitments binding on Thomson Reuters.³ It argued that the Commission had manifestly erred in considering that the commitments addressed the competition concerns. The Commission had thus acted *ultra vires* and in breach of the principle of proportionality. According to Morningstar, the commitments should have included the right for competing providers to handle RICs, allowing them to develop switching tools.

The General Court sided with the Commission and upheld the contested decision, stating that the Commission did not err in finding that the commitments offered by Thomson Reuters removed the anticompetitive behaviour. The Commission's concerns focused on switching difficulties faced by customers, which were effectively addressed by offering customers the possibility to switch provider, either on their own or by relying on third party developers. Granting RIC licences to Thomson Reuters' competitors would therefore go beyond what was necessary. The Court in particular stressed that the possibility for third party developers to collaborate with competing datafeed providers offers the necessary guarantees as to reliability of the interoperability tool. It is furthermore immaterial in its view whether the commitments fully eliminate switching costs, as they facilitate switching at a reasonable cost.

Setting the bar high for third party appellants

Morningstar v Commission is one of the few instances in which EU Courts have ruled on the commitment process under Article 9 of Regulation 1/2003. This in itself is of value, in particular, because the Commission increasingly accepts voluntary remedies to bring proceedings under articles 101 and 102 TFEU to an end. Recent examples include commitments offered by Paramount and Viacom (restrictions on cross-border access to pay-TV),⁴ container shipping companies (price signalling),⁵ and Samsung (standard essential patents).⁶ The section below discusses three aspects of the Morningstar judgment that impact the prospects of successful appeals by third parties: (i) admissibility, (ii) the scope of the judicial review, and (iii) the role of the proportionality principle.

i. Admissibility

The Court found the appeal admissible because not only had Morningstar actively participated

³ Commission Decision of 20 December 2012, Case AT.39654 – *Reuters Instrument Codes*.

⁴ Commission decision of 26 July 2016, Case AT.40023 – *Cross-border access to pay-TV*.

⁵ Commission decision of 7 July 2016, Case AT.39850 – *Container Shipping*.

⁶ Commission Decision of 29 April 2014, Case AT.39939 – *Samsung - Enforcement of UMTS standard essential patents*.

in the administrative procedure, but also the abusive behaviour of Thomson Reuters could have had a significant negative effect on its business. The Court thereby explicitly held that the active participation of a third party in the administrative proceedings is as such insufficient for it to be directly and individually concerned, hence clarifying an ambiguity created by the *Alrosa* judgment.⁷

ii. Scope of judicial review

The Court re-iterated that the Commission enjoys a very wide margin of discretion to accept or reject commitments. The Commission's assessment is forward-looking and based on numerous economic factors, similar to its review in merger control cases. The Court's review is therefore necessarily limited to verifying whether the Commission's assessment is manifestly wrong. In the framework of the Court's *post-factum* judicial review it is moreover immaterial whether the commitments produced effects on the market since their implementation.

iii. Role of proportionality

In line with *Alrosa*, the Court held that Article 9 of Regulation 1/2003 – in contrast to Article 7 of Regulation 1/2003 – does not explicitly refer to the Commission's duty to observe the principle of proportionality. Hence, proportionality only applies as a general principle of EU law. Its application in Article 9 proceedings is therefore confined to verifying (i) if the commitments address the competition concerns and (ii) whether less onerous commitments were offered which also address these concerns. As a consequence, the Commission may accept commitments which go beyond the remedies it could have formally imposed in the context of an infringement decision under Article 7 Regulation 1/2003. However, the Commission is not entitled under Article 9 Regulation 1/2003 to require commitments which go beyond what is necessary to remedy the anticompetitive practices. Given that the commitments were sufficient to address the concerns, the Court concluded that the Commission did not breach the proportionality principle.

Conclusion – Commission's powers reinforced

The *Morningstar* judgment reinforces the Commission's far-reaching powers in the context of Article 9 of Regulation 1/2003. In *Alrosa*, the Court of Justice established that the Commission is under no duty to seek less burdensome remedies insofar the commitments offered by the companies under investigation address the competition concerns. This bolstered the risk for undertakings under scrutiny to be coerced into accepting onerous remedies to avoid the imposition of fines or other remedies by a formal infringement decision. *Morningstar* leaves little illusion as to the chances of success for third parties bringing appeals against commitment decisions arguing that they do not go far enough to address anticompetitive behaviour negatively affecting them. The judgment is therefore expected to strengthen the Commission's willingness to disregard the opinion of dissatisfied third parties in the context of Article 9 procedures.

⁷ CFI, Case T-170/06 *Alrosa v Commission* E.C.R. II-2601, paras 36-41; Lenaerts, Maselis, Gutman, *EU Procedural law*, 2014, 338.